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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 6–10) are not officially reported. The opinion of the Court of Appeals (R. 14–22) is reported as 258 F. 2d 568. Its opinion on rehearing (R. 29–31) appears at 258 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958. (R. 13.) Petitions for rehearing were denied on September 3, 1958. (R. 29–31.) The petition for a writ of certiorari was filed on December 2, 1958, and was granted on January 19, 1959. (358 U.S. 940; R. 32.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Internal Revenue Code of 1939, a taxpayer who has failed, without excuse, to file a declaration of estimated income tax is subject to the addition for substantial underestimation of his estimated tax, as well as to the addition for failure to file a declaration.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 58 (a) and (b) and 294(d) (1) and (2) of the Internal Revenue Code of 1939 and Section 29.294–1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, are set forth in the Appendix, *infra*, pp. 28–34.

STATEMENT

The facts are undisputed and may be briefly summarized as follows:

The taxpayer is an attorney. During the years 1947 through 1950 inclusive, he failed to file any declaration of estimated income tax. There was no reasonable cause for these failures. The Commissioner imposed two additions to the tax for each of the years involved, the one for failure to file a declaration, the other for substantial underestimation of his estimated tax. (R. 7, 8, 10, 16.) The Tax Court sustained the Commissioner's imposition of both additions. (R. 10.) The Court of Appeals affirmed with respect to the imposition of the addition (under Section 294(d) (1)(A)) for failure to file a declaration (R. 16–17), but reversed with respect to the addition (under Section 294(d)(2)) for substantial underestimation, holding that the latter could not be imposed in circum-

stances where the taxpayer is being penalized for non-filing (R. 17–20, 29–31).

SUMMARY OF ARGUMENT

A

In adopting a pay-as-you-go scheme of income taxation, Congress provided that taxpayers must estimate future income and pay periodically in accordance with their estimates. To implement these provisions, Congress further provided in the 1939 Code (here involved) for certain additions to tax: (1) If a taxpayer fails to file a timely declaration of estimated tax or if he fails to make the requisite quarterly payments in accordance with his estimate, he is subject to a penalty which may amount to as much as ten percent of the final tax; (2) if his estimate proves to be a substantial underestimate, *i.e.*, less than 80 percent of the final tax, he is subject to an addition amounting to six percent of the difference between the estimate and the final tax. The question presented here is whether both additions may apply to a case in which no estimate has been filed and there has been no satisfaction of the tax obligation (either by credits, withholdings or payments) during the taxable year.

In the Government's view, the ten percent addition for non-filing is a penalty for a breach of duty. Significantly, it may not be applied when the failure is "due to reasonable cause." The six percent addition, on the other hand, is in the nature of an interest charge. It applies whenever the Government is delayed in receiving those amounts which it would have

received had the taxpayer filed a substantially correct estimate and made timely payments thereunder. This charge applies whether or not there is reasonable cause for the underestimate. For purposes of applying the six percent addendum, the Government, in accordance with Treasury Regulations, treats the non-filing of a declaration as equivalent to a declaration that no tax is due.

Accordingly, the provisions for the two addenda are not mutually exclusive. Thus, a taxpayer who fails, for reasonable cause, to file a declaration pays no penalty, but is subject to the six percent addition. Conversely, a taxpayer may be subject to penalty for unexcused failure to file a declaration, although he is not subject to the six percent addendum. This occurs when credits or withholdings are sufficient in amount so that there is no substantial understatement within the statutory definition. (The six percent addendum applies only when the estimate, increased by designated credits, falls substantially short of the final tax.) As three circuits have held (the court below being the only appellate tribunal to rule otherwise), the two provisions for addition to tax are independent and both of them apply only in the following circumstances: (1) when the nonfiling is unexcused, and (2) the actual consequence is that the Government is delayed in receiving its revenues.

B

In 1943, contemporaneously with the enactment of the original legislation providing for pay-as-you-go taxation, the Treasury promulgated Regulations which

declared that, for purposes of applying the addendum for substantial underestimation, the taxpayer who fails to estimate shall be deemed to have estimated a tax of zero. Despite various legislative changes made during the life of the 1939 Code, at no time has Congress indicated disapproval of these Regulations. Accordingly, we submit, the Regulations must be given the effect of law unless they are found to be plainly inconsistent with the statute or unreasonable.

C

1. The statutory provisions involved provide intrinsic evidence that Congress has purposefully distinguished between the penalty for non-filing of a declaration and the addendum for substantial underestimation. This is shown by consistent separateness of treatment in the statute; by the significant difference in rates (ten percent—a typical penalty—as contrasted with six percent—the traditional rate of interest); and, perhaps most clearly, by the distinction which is drawn by the statute in relation to the element of fault or willfulness. Under the provisions relating to substantial underestimation, the rate (six percent) is stationary; the provisions are self-executing; and lack of fault is irrelevant. Under the discrete provisions dealing with non-filing, the measure of addition depends upon the duration of the violation; the addendum may amount to ten percent if the violation persists; and lack of fault is a complete defense.

2. The legislative history fully confirms the proposition that the applicable Treasury Regulations effec-

tuate the congressional purpose. The committee reports which accompanied the initial enactment of pay-as-you-go income taxation, discussing the addition for substantial underestimation, declare:

> In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision [substantial underestimation] will be zero.

The Treasury Regulations, which were promulgated shortly thereafter, adopted this authoritative expression of Congress *in haec verba*.

Nothing which Congress has said since that time is at variance with the view that it originally expressed. And when Congress, in enacting the 1954 Code, undertook to change the "addition" provisions, it expressly stated that, under the provisions of the 1939 Code, the two addenda "may run concurrently."

3. The Regulations are reasonable. Certainly, Congress and the administrative authorities could reasonably take the position "that those whose willful nonexcusable acts prevented the effective operation of the scheme of self-assessment and current payment ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty." *Patchen* v. *Commissioner,* 258 F. 2d 544, 552 (C.A. 5th). This does not involve "double penalties." In the situation where both addenda apply, one is in the nature of compensation for the Government's delay in receiving revenue and the other is a penalty for breach of duty. Moreover, the latter (the ten percent addendum) rests upon an independent element—the taxpayer's fault in persistently ignoring

the law and failing to file. The same approach is reflected in other provisions of the Code of Internal Revenue.

It is no answer that if this taxpayer had filed a false declaration showing no tax due, he would have been subject only to the six percent addendum. That argument overlooks the fact that the criminal law imposes heavy sanctions for false swearing.

Concededly, Congress could have provided, had it chosen to do so, that the six percent addendum, which is in the nature of an interest charge, is to be forgiven in all cases where the provision for the ten percent penalty applies. The statute, however, evinces no such purpose; the provisions for the addenda are independent, not in the alternative. Moreover, the legislative history, as noted above, precludes such an interpretation. Congress declared (as did the Treasury in its Regulations) that, for purposes of computing the six percent addendum for substantial underestimation, no declaration is equivalent to a declaration of no tax. This, of course, necessarily contemplates that the addition for substantial underestimation may be imposed in the situation where no declaration has been filed.

ARGUMENT

PROVISIONS OF THE 1939 CODE AUTHORIZING ADDITIONS TO TAX FOR NON-FILING OF DECLARATION OF ESTIMATED TAX AND FOR SUBSTANTIAL UNDERESTIMATION OF TAX ARE NOT MUTUALLY EXCLUSIVE. IN THE CIRCUMSTANCES OF THIS CASE, BOTH PROVISIONS FOR ADDITION TO TAX ARE APPLICABLE.

A. INTRODUCTION

This case arises from Congress's adoption, in 1943, of a pay-as-you-go scheme of income taxation. That scheme, of course, necessarily contemplates that taxpayers estimate their income early in the taxable year and that they make periodic payments without awaiting the final computations which can only be made at the conclusion of the year. It requires, for its effective implementation, (*a*) that taxpayers make reasonable estimates, (*b*) that they pay periodically in accordance with these estimates, and (*c*) that the Government be compensated for its temporary loss of revenue in those instances when estimates, for one reason or another, prove substantially inadequate. These necessities find explicit and separate expression in the relevant statutory provisions.

Section 58 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 28–29) requires a taxpayer to file a declaration setting forth the amount which he estimates to be his tax for the current taxable year. Section 59 (26 U.S.C. 1952 ed., Sec. 59) requires quarterly payments of the estimated tax.

To enforce these requirements, Congress has provided that there shall be prescribed additions to tax in the event of non-compliance.

It has provided, *first*, for additions in the event of a failure to file a timely declaration *or* to make timely quarterly payments of the estimated tax. Section 294(d)(1) (A) and (B), Appendix, *infra*, pp. 29–30. These additions may amount to 10 percent of the tax.[1] *Ibid.* Significantly, the additions to tax authorized by this section are not to be imposed if the failure was "due to reasonable cause and not to willful neglect." *Ibid.*

Congress provided, *secondly*, that there shall be an addition to tax in the event of substantial underestimation. Section 294(d)(2), Appendix, *infra*, pp. 30–31. This takes place when the estimate proves to be less than eighty percent of the final tax liability.[2] *Ibid.* The addition for underestimation cannot exceed six percent.[3] As to this addition to tax, there is no forgiveness for reasonable cause.

In the instant case, taxpayer ignored his obligations completely in each of the years involved, making no declarations and paying no estimated taxes. The Commissioner imposed ten percent additions under Section 294(d)(1) (on the ground that there was an

[1] A taxpayer is subject to a five percent addition when the failure to file the declaration or to make the required quarterly payment occurs. There is an additional one percent addition for each month during which the breach of duty continues, subject to the limitation that the aggregate addition shall not exceed ten percent.

[2] An exception not here relevant makes somewhat different provision in the case of taxpayers who are farmers.

[3] Section 294(d)(2) provides that the addition shall be the lesser of two figures: (1) six percent of the amount by which the final tax exceeds the estimated tax; (2) the dollar amount by which eighty percent of the final tax exceeds the estimated tax.

unexcused failure to file declarations) and six percent additions under Section 294(d)(2) (on the ground that "no declaration" was tantamount to an estimate of "no tax" and that substantial understatements resulted).

The Tax Court upheld both sets of additions. The Court of Appeals sustained the ten percent additions for non-filing, but concluded that the six percent additions for substantial underestimation could not be sustained.[4] The view of the court below was that, although the Commissioner's action was authorized by the pertinent Regulations, it should not impute to Congress, in the absence of unequivocal statutory language (which it found lacking), a purpose to impose two "penalties" for one omission. (R. 30–31.) The court recognized that its holding was in conflict with the decisions of the three other courts of appeals which have passed upon the question: those of the Third Circuit (*Abbott* v. *Commissioner*, 258 F. 2d 537), the Fifth Circuit (*Patchen* v. *Commissioner*, 258 F. 2d 544), and the Ninth Circuit (*Hansen* v. *Commissioner*, 258 F. 2d 585, reversed on other grounds, 360 U.S. 446).[5]

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[4] Taxpayer's petition for certiorari was denied, 358 U.S. 940, and the application of the ten percent addition to tax is not in issue before this Court.

[5] The Commissioner's position has also been consistently upheld in the Tax Court. The district courts are seriously divided. For a collection of Tax Court and district court decisions, see the Government's petition for certiorari, page 6, notes 7–9. We note also that the Tax Court has reaffirmed its position since the date of the instant decision. See *Irby* v. *Commissioner*, 30 T.C. 1166.

We would stress, at the outset, that in our view this is not a case of "double penalties." The statutory provision for the six percent addition to tax for substantial underestimation is in the nature of a provision for the payment of interest. It serves to compensate the Government in all instances when the Government does not obtain timely receipt of that amount of money which it would have obtained had the taxpayer filed a reasonably accurate estimate and acted in accordance therewith. This is so whether or not the failure to obtain such receipt resulted from fault on the taxpayer's part.

In contrast, the ten percent addition for non-filing of a declaration or for non-payment of quarterly instalments is in the nature of a penalty for breach of duty.[6] That this provision is not in the nature of an interest charge is evidenced by (1) the fact that ten percent is not a normal rate of interest; (2) the fact that provision for this addition is discrete from the provision for addition to tax for substantial underestimation; and (3) the fact that this addition to tax may not be imposed when the failure to file or to pay was the result of reasonable cause, rather than willful neglect.

It is evident from what has just been stated that the six percent addition for substantial underestimation and the ten percent addition for non-filing are *not* mutually exclusive. A taxpayer who fails, for reasonable cause, to file a declaration does not pay

[6] Ten percent is the maximum figure. The percentage may be less if the violation is promptly discontinued. See p. 9, note 4, *supra*.

ten percent penalty; he is subject, however, to six percent addition.[7]

'onversely, a taxpayer may be subject to the ten cent addition, but not to the six percent addition. uppose, for example, that a taxpayer, without excuse, ails to file a declaration. Suppose, further, that he s a wage earner and that a portion of his salary is withheld each pay day (pursuant to sfatutory pro-isions for withholding) and that, as a result of nch withholding, the Government receives, during the xable year, eighty percent of the final tax.[8] In at circumstance, there is no substantial underesti-nation within Section 294(d)(2), and the six percent harge does not apply.[9] Nonetheless, on these facts, the taxpayer would be subject to an addition for failure

See *Patchen* v. *Commissioner*, 258 F. 2d 544 (C.A. 5th); *Kunsch* v. *Commissioner*, 258 F. 2d 585 (C.A. 9th), reversed on other grounds, 360 U.S. 146; *Hartley* v. *Commissioner*, 23 T.C. 555, opinion modified, 23 T.C. 564; *Shippen* v. *Commissioner*, 30 T.C. 416, currently on appeal to the Fifth Circuit. But see *Jones* v. *Wood*, 151 F. Supp. 678 (D. Ariz.) and *Wood* v. *United States*, 163 F. Supp. 426 (E.D. Tex.), which reached the anomalous conclusion that a taxpayer who neither files a declaration nor pays any instalment of estimated tax is excused from all additions where his failure to file is explained by "reasonable cause," although "reasonable cause" is no defense under Section 294(d)(2). See p. 18, note 18, *infra*.

[8] A variation of this illustration is provided by the situation where a taxpayer has a credit resulting from overpayment of tax in a previous year.

[9] Section 294(d)(2) begins with the words—"If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35) * * * exceeds the estimated tax (*increased by such credits*), there shall be added to the tax," etc. (Emphasis added.)

to file a declaration, amounting to ten percent of the excess of the correct tax over the amounts withheld, *i.e.*, ten percent of the difference between the final tax and eighty percent of that tax.[10]

It is true, of course, that where, as here, a taxpayer inexcusably fails to file a declaration of estimated tax *and* there is a tax due which goes unpaid (there being no withholding or other credit to satisfy the eighty percent obligation), he is subject, under the Government's theory, to the six percent charge (which we deem to be in the nature of an interest charge) and to the ten percent addition (which is in the nature of a penalty for breach of duty to file). In these circumstances, the two impositions serve separate functions, and both are authorized, as we shall point out in the succeeding section of this brief, by the applicable Regulations—Regulations which have congressional approval. As we shall further argue (*infra*, pp. 15–26), the Regulations are consistent with the underlying statute, with its history and with its purposes.

B. THE COMMISSIONER'S IMPOSITION OF THE TWO ADDITIONS RESTS ON LONG-STANDING TREASURY REGULATIONS

Treasury Regulations 9 (Section 29.294–1(b)(3) of Treasury Regulations 111, Appendix *infra*, p. 34) provide that if a taxpayer fails to file the required declaration of estimated tax, the amount of the estimate for purposes of determining the addition for substantial underestimation under Section 294(d)(2)

[10] Under Section 294(d)(1)(A), the ten percent for nonfiling is applied to the "correct tax reduced by the credit under sections 32 and 35" (withholding provisions).

shall be zero. In other words, for purposes of this section of the revenue laws, "no declaration" is deemed equivalent to a declaration of "no tax."

This regulatory provision was initially incorporated in Treasury Regulations in September 1943,[11] approximately three months after the "addition" provisions were first enacted into law. Although numerous changes in the 1939 Code dealing with these provisions were made by Congress in subsequent years[12] (*i.e.*, between 1943 and 1954), Congress has at no time indicated disapproval of the Regulations in question.[13] And the Treasury has maintained this feature of the Regulations without change throughout the life of the 1939 Code, although it has made numerous other changes in the regulatory provisions relating to estimation of tax.[14]

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[11] T.D. 5297, 1943 Cum. Bull. 243; T.D. 5305, 1943 Cum. Bull. 260.

[12] Revenue Act of 1943, c. 63, 58 Stat. 21, Section 118(a); Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sections 6(b)(8) and 13(b) and (e); Social Security Act Amendments of 1950, c. 809, 64 Stat. 477, Section 208(d)(8); Act of January 2, 1951, c. 1195, 64 Stat. 1136, Section 2; Revenue Act of 1951, c. 521, 65 Stat. 452, Section 103(b). And see discussion of the legislative history of Section 294(d), *infra*, pp. 19-23.

[13] As we also point out *infra*, pp. 19-20, the Regulations are in precise accord with expressions of congressional intent manifested in committee reports which accompanied the original legislation.

[14] See Section 29.294-1(b)(3) of Treasury Regulations 111, as added by T.D. 5305, 1943 Cum. Bull. 260, and as amended by T.D. 5403, 1944 Cum. Bull. 349, T.D. 5420, 1944 Cum. Bull. 355, T.D. 5448, 1945 Cum. Bull. 256, T.D. 5855, 1951-2 Cum. Bull. 141, and T.D. 5937, 1952-2 Cum. Bull. 171; and Section 39.294-1(b)(3) of Treasury Regulations 118.

Thus, we have here a regulatory provision adopted contemporaneously with the underlying statute and long continued in effect. As this Court has stated, Regulations "long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill*, 305 U.S. 79, 83.

In these circumstances, the Treasury Regulations must be sustained "unless unreasonable and plainly inconsistent" with the statute which they interpret. *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501. Here, we shall urge, the Regulations are both consistent and reasonable.

C. THE TREASURY REGULATIONS ARE CONSISTENT WITH THE STATUTE AND REASONABLY FULFILL ITS PURPOSE

1. *The language and the structure of the statute show that each of the two additions imposed has a distinct basis*

A reading of the statutory provisions furnishes "intrinsic evidence," as the Fifth Circuit has stated (*Patchen* v. *Commissioner*, 258 F. 2d 544, 552), that Congress has purposefully distinguished between the three categories of addition to tax (for a non-filing of declaration, for a non-payment of an instalment and for substantial underestimation).[15] With respect

[15] The *Patchen* opinion further states (*ibid*):

> There were three categories of defaulting taxpayers whom Congress plainly meant to reach: (1) those who, without reasonable excuse, failed to file any declaration of estimated tax, (2) those who, without reasonable excuse, failed to pay installments on the basis of the estimate and (3) those who failed to make an accurate estimate which would affect both (1) and (2).

to the distinctions between the addition for underestimation and the other two additions, we point particularly to the separateness of treatment in the statute; to the differences in rates and manner of application; and to the distinctions which are drawn in relation to the element of fault or wilfulness. These considerations point to the conclusion that the scheme is one which imposes a charge, in the nature of an interest charge, when the Government, whatever the reason, does not receive sufficient revenue at the time it should have been received and imposes separate and distinct additions for specified breaches of duty (non-filing or non-payment, without reasonable cause).

Provisions relating to estimation came into the law in 1943 when income tax collections were first put on a pay-as-you-go basis by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Section 5. Section 294 of the Code, which is involved here, was revised some eight months later by the Revenue Act of 1943, c. 63, 58 Stat. 21, Section 118(a).[16] Section 294(d) remained in essentially the same form from that date until the adoption of the 1954 Code. Only the provisions enacted by the Revenue Act of 1943 are involved in this case. However, in order to give a full picture of the scheme of the statute, we shall summarize, first, the relevant provisions enacted by the earlier 1943 statute (the Current Tax Payment Act) and then deal with the changes made in the later enactment of the same year.

[16] In the interim, the Treasury Regulations described in the preceding section of this brief had been adopted.

The Current Tax Payment Act, Section 5(b), added paragraphs (3), (4) and (5) to Section 294(a) of the 1939 Code. Paragraph (3) provided that in the case of a failure to make and file a timely declaration there shall be added to the tax an amount equal to ten percent of the tax. Paragraph (4) provided that in the case of a failure to make a timely payment of any instalment of the estimated tax there shall be added to the tax the greater of $2.50 or two and one-half percent of the tax for each instalment due but unpaid. Paragraph (5) provided that if a taxpayer substantially underestimated his estimated tax, *i.e.*, if his estimated tax proved to be less than eighty percent of his final tax liability, there shall be added to the tax the lesser of six percent of the difference between the amount of the estimated tax and the final tax or the dollar amount of the difference.

The changes made by the Revenue Act of 1943 may be summarized as follows. *First*, that Act changed the arrangement of the provisions with respect to the three additions to the tax (incidentally removing the provisions from Section 294(a) and placing them in a new subsection, 294(d)). In place of three separate paragraphs, the additions for failure to file a declaration and for failure to pay an instalment were grouped together in subparagraphs (A) and (B) of Section 294(d)(1);[17] the addition for substantial underestimation was set forth separately in Section

[17] The language makes clear that these additions are alternative. Section 294(d)(1)(B), Appendix, *infra*, p. 30. See, also, p. 20, note 19, *infra*.

294(d)(2). *Second*, the measure of the additions to be imposed for failure to file and to pay were changed. In place of the different rates applicable for failure to file and for failure to pay, the same rates were made applicable to both. Also, in place of a fixed amount, the rates were graduated according to the length of time the violation continued, *i.e.*, five percent at the time of the breach, with an additional one percent for each successive month that it continues, the aggregate, however, not to exceed ten percent. On the other hand, no change was made in the measure of the addition to be imposed for substantial underestimation, and it remained a fixed rate (six percent) calculated upon the difference between the amount of the final tax liability and the amount of the estimate. *Third*, the Act explicitly provided that neither the addition for failure to file nor for failure to pay would apply where such failure was shown to be due to reasonable cause. No similar exculpatory provision was made applicable to the addition for underestimation.

As these provisions indicate, the six percent addition for underestimation makes the Government whole when it has been delayed, whatever the reason, in receiving its revenue. The rate is stationary; the provision is self-executing; and neither fault nor wilfulness is relevant.[18] Under the discrete provision deal-

[18] See *Kaltreider* v. *Commissioner*, 255 F. 2d 833, 839 (C.A. 3d); *Clark* v. *Commissioner*, 253 F. 2d 745, 751 (C.A. 3d); *McMurtry* v. *Commissioner*, 262 F. 2d 589 (C.A. 5th), affirming, *per curiam*, 29 T.C. 1091, 1094; *Smith* v. *Commissioner*, 20 T.C. 663; *Shippen* v. *Commissioner*, 30 T.C. 716, 730, appeal pending to the Fifth Circuit; *Ford* v. *Commissioner*, 29 T.C. 499, 506; *Hickman* v. *Commissioner*, 29 T.C. 864, 878.

ing with non-filing and non-payment, the measure of addition depends upon the duration of the violation: the addition may amount to ten percent—a penal figure—if the violation persists; and lack of fault is a complete defense.

2. *The Regulations conform precisely to the intent of Congress manifested in the legislative history*

The pertinent Regulations, as observed above, expressly provide that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision [Section 294(d)(2)] is zero" (Appendix *infra*, p. 34). There can be no question that this is consistent with the congressional purpose, for this is an instance in which the Regulations are phrased in precisely the same terms as appear in the authoritative expressions of Congress appearing in the relevant committee reports.

The initial legislation which provided for estimation of tax (the Current Tax Payment Act) also provided, as noted *supra* (p. 17), for three additions to tax. In the words of the accompanying committee reports (H. Rep. No. 401, 78th Cong., 1st Sess., pp. 37–38, 1943 Cum. Bull. 1283, 1311; S. Rept. No. 221, 78th Cong., 1st Sess., pp. 41–42, 1943 Cum. Bull. 1314, 1344–1345; H. Conference Rep. No. 510, 78th Cong., 1st Sess., pp. 55–56, 1943 Cum. Bull. 1351, 1372), "These paragraphs contain sanctions relating to the filing of declarations and payment of installments of estimated tax and to the proper estimate of tax." The Senate Report (No. 221, *supra*, p. 42; 1943 Cum. Bull. 1345) and the Conference Report (No. 510, *supra*, p. 56; 1943 Cum Bull.

1372), discussing the addition for substantial underestimation, go on to state:

> In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision [substantial underestimation] will be zero.

This, of course, necessarily contemplates that the addition for substantial underestimation may be imposed in situations where no declaration has been filed.

The reports accompanying the changes made by the Revenue Act of 1943 do not advert to the point. It is notable, however, that in the interim period between the two 1943 enactments, the Treasury had adopted its Regulations conforming precisely to the expression by Congress. It is also notable that the committee reports accompanying the later Act affirmatively state that the penalties for failure to file a declaration and for non-payment of an instalment due under a declaration (penalties which were grouped together in Section 294(d)(1)) are alternative and not cumulative, but make no similar statement with respect to the addition for underestimation.[7]

The statutory provisions relating to estimation of tax were revised in numerous particulars in the years between 1943 and the date of adoption of the 1954 Code. None of the revisions made any significant change in the dual provisions for addition to tax represented by Section 294(d)(1) and 294(d)(2), and nothing in the committee reports suggests views at

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[7] S. Rep. No. 627, 78th Cong., 1st Sess., pp. 21-22, 47-48 (1944 Cum. Bull. 973, 990, 1005-1006); H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 43-44 (1944 Cum. Bull. 1059, 1061-1062).

variance with the Treasury Regulations here involved.[20]

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[20] The amending statutes, together with the committee reports relating to each, are as follows:

Amendments to Section 58:

Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Section 13(a) [see H. Rep. No. 1365, 78th Cong., 2d Sess., pp. 30-31 (1944 Cum. Bull. 821, 844-845); S. Rep. No. 885, 78th Cong., 2d Sess., pp. 33-35 (1944 Cum. Bull. 858, 883-885)].

Revenue Act of 1945, c. 453, 59 Stat. 556, Section 102(b)(4) [see H. Rep. No. 1196, 79th Cong., 1st Sess., pp. 15-16 (1945 Cum. Bull. 595, 607); S. Rep. No. 655, 79th Cong., 1st Sess., p. 26 (1945 Cum. Bull. 621, 642); H. Conference Rep. No. 1100, 79th Cong., 1st Sess., p. 4].

Revenue Act of 1948, c. 168, 62 Stat. 110, Section 202(a) [see H. Rep. No. 1274, 80th Cong., 2d Sess., pp. 45-46 (1948-1 Cum. Bull. 241, 277-278); S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 50-51 (1948-1 Cum. Bull. 285, 321-325)].

Social Security Act Amendments of 1950, c. 809, 64 Stat. 477, Section 208(d)(4) [see S. Rep. No. 1669, 81st Cong., 2d Sess., pp. 153-154, 165 (1950-2 Cum. Bull. 302, 352-353, 361)].

Revenue Act of 1950, c. 994, 64 Stat. 906, Section 221(g) [see H. Rep. No. 2319, 81st Cong., 2d Sess., p. 104 (1950-2 Cum. Bull. 380, 455); S. Rep. No. 2375, 81st Cong., 2d Sess., p. 102 (1950-2 Cum. Bull. 483, 555)].

Amendment to Section 39:

Individual Income Tax Act of 1944, *supra*, Section 13(a) [see H. Rep. No. 1365, *supra*, pp. 31-32 (1944 Cum. Bull. 821, 845-846); S. Rep. No. 885, *supra*, pp. 35-36 (1944 Cum. Bull. 858, 885)].

Amendments to Section 294(d):

Individual Income Tax Act of 1944, *supra*, Sections 6(b)(8) and 13 (b) and (e) [see H. Rep. No. 1365, *supra*, p. 33 (1944 Cum. Bull. 821, 846); S. Rep. No. 885, *supra*, pp. 36-37 (1944 Cum. Bull. 858, 886-887)].

Social Security Act Amendments of 1950, *supra*, Section 208 (d)(8) [see S. Rep. No. 1669, *supra*, p. 165 (1950-2 Cum. Bull. 302, 361)]. [Cont'd. on following page.]

In the 1954 Code (which is not directly involved in this case), Congress eliminated the separate additions theretofore authorized for substantial underestimation and for failure to file a declaration or pay an installment. By Section 6654 (26 U.S.C. 1952 ed., Supp. V, Sec. 6654), it provided in their stead for a single addition based upon underpayment of the estimated tax and calculated at the rate of six percent of the amount of the underpayment.[21] See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 100–101, A397, A419 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127–4128, 4544–4545, 4567); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 135–136, 592–593 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769–4770, 5241–5243). In explaining this change, both the House Report (No. 1337, *supra*, p. 100; 3 U.S.C. Cong. & Adm. News (1954) 4017, 4127) and the Senate Report (No. 1622, *supra*, p. 135; 3 U.S.C. Cong. & Adm. News (1954) 4621, 4769), express the clear understanding of Congress that the 1939 Code authorized, in appropriate cases, an addition for underestimation and a concurrent addition for failure to file a declaration, stating:

Act of January 2, 1951, c. 1195, 64 Stat. 1136, Section 2 [see H. Rep. No. 3294, 81st Cong., 2d Sess.].

Revenue Act of 1951, c. 521, 65 Stat. 452, Section 103(b) [see S. Rep. No. 781 (Part 2), 82d Cong., 1st Sess., p. 3 (1951-2 Cum. Bull. 545, 546)].

[21] Section 6654 also explicitly provides that "section 294(d) of the Internal Revenue Code of 1939 shall continue in force with respect to taxable years beginning before January 1, 1955."

> Additional charges are imposed under the present law for failure to file a declaration or make a payment of the estimated tax or for substantial underestimates of tax liability. These charges may be severe. For failure to file a declaration or to pay an installment of the estimated tax, the total charge may be as high as 9 percent of the unpaid installment. For a substantial underestimate of tax, that is, an estimated tax which is less than 80 percent of the actual tax liability for the year (66⅔ percent in the case of farmers), a charge of 6 percent of the amount by which the final tax liability exceeds the estimated tax may be imposed. *This charge and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due.* [Emphasis added.]

Thus, from the time that pay-as-you-go provisions were incorporated in the 1939 Code (1943) until the present, the history uniformly supports the conclusion that the governing Treasury Regulations conformed to the intent of Congress.

3. *The Regulations are reasonable*

As the statutory scheme and legislative history (discussed above) show, the addition for underestimation must be regarded as being in the nature of an interest charge compensating the Government for delay in receiving those amounts which it would have received had taxpayer paid, each quarter, substantially one-fourth of his final tax liability. The separate addi-

tion for non-filing of a declaration (or non-payment thereunder) is for an unexcused breach of the duty to conform to the statutory scheme of assessment and current payment. Assuredly, Congress (and the Treasury, in implementing the statute) could reasonably take the position "that those whose willful non-excusable acts prevented the effective operation of the scheme of self-assessment and current payment ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty," *Patchen v. Commissioner*, 258 F. 2d 544, 552 (C.A. 5th).

This does not involve a scheme of "double penalties." To begin with, since the incidence of the two types of additions differs, there are cases in which the six percent addition will apply and the ten percent addition will not; there are also instances in which the converse results. See pp. 11–13, *supra*. Moreover, in those cases (such as the instant one) where, under the Government's view, both additions are applicable, this is so only because the taxpayer's conduct has more than one element. The six percent addition rests upon delay in the Government's receipt of those amounts which it would have received had the taxpayer filed a substantially correct estimate and made timely payments thereunder. The ten percent addition rests upon an independent factor—the taxpayer's fault in persistently ignoring the law and failing to file.

Such a legislative approach is hardly novel. Indeed, it finds its counterpart in other provisions of the 1939 Code. For example, a taxpayer is liable for interest under Sections 292 and 294 (a) and

(b) (26 U.S.C. 1952 ed., Secs. 292, 294) when he has failed to pay, has underpaid or has paid late the amount of his final tax liability. He may also be subject to additions under Section 291 of the 1939 Code (26 U.S.C. 1952 ed., Sec. 291) for failure to file a return, and under Section 293(b) (26 U.S.C. 1952 ed., Sec. 293) for fraud. See *Rocrich* v. *Commissioner*, 38 B.T.A. 567, 583–584, affirmed, 115 F. 2d 39 (C.A.D.C.), certiorari denied, 312 U.S. 700; *Foxel* v. *Commissioner*, decided November 17, 1950 (1950 P-H T.C. Memorandum Decisions, par. 50,281); *Page* v. *Commissioner*, decided May 10, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,147); *McGovern* v. *Commissioner*, decided January 7, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,001); *Mindell* v. *Commissioner*, decided January 26, 1955 (1955 P-H T.C Memorandum Decisions, par. 55,017); *Lucido* v. *Commissioner*, decided January 31, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,023). See, also, *United States* v. *Ridley*, 127 F. Supp. 3, 11 (N.D. Ga.).[22]

There is no inequity, we submit, in holding that one who inexcusably failed to file a declaration—thus withholding information from the Government and impeding the operation of the scheme for current payment of income taxes—should be subject to

[22] Congress has ordinarily attempted to declare the instances in which additions are not to be concurrently imposed. See *e.g.*, Section 293(a) of the 1939 Code, which prohibits the Commissioner from imposing interest on a deficiency and an addition for negligence. Similarly, under the 1954 Code, instances where the Commissioner may not impose concurrent additions for the same act, as for delinquency and fraud, are clearly set forth in the statute. See Section 6653(d) (26 U.S.C. 1952 ed., Supp. V, Sec. 6653(d)).

ddition separate and apart from the addition
is imposed upon one who, though he has under-
ted (perhaps inadvertently), has nonetheless
lied with the specific requirement that he file
laration. Nor is it an answer to say that it
fair to impose the two additions in the instant
ion because taxpayer could have limited the
addendum to six percent by filing a false decla-
n showing no tax due. There are criminal pen-
for false swearing.

is true that Congress, in dealing with situations
as the one at bar, might have chosen to realize
rposes by providing for the ten percent addi-
n lieu of the six percent "interest" charge,
nposing, in effect, a four percent penalty, rather
ten percent penalty, for failure to file a
tion—which is the effect of the decision below.
s not appear from the statute that Con-
roposed to do so. The six percent addi-
l the ten percent addition are independently
and independently provided for; they are not
lternative. Moreover, the legislative history
riginal enactment and the continued approval
ress of the Treasury Regulations demonstrate,
ve, that the statute is not to be otherwise
ted.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As added by Sec. 5, Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and as amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, and Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110]. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.[1]

(b) *Contents of Declaration.*—In the declaration required under subsection (a) the individual shall state—

[1] Prior to the amendment by Section 202(a) of the Revenue Act of 1948, *supra*, the amounts set forth in subparagraphs (1) and (2) of subsection (a) were $5,000 and $500, and $100 and $500, respectively.

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source;

(2) the amount which he estimates as the credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

* * * * *

(26 U.S.C. 1952 ed., Sec. 58.)

SEC. 294 [As added by Sec. 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21, and as amended by Secs. 6(b)(8), and 13(b) of the Individual Income Tax Act of 1944, *supra*, Sec. 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136]. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(d) *Estimated Tax.*

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid,

1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

(B) *Failure to Pay Installments of Estimated Tax Declared.*—Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section

60(a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66⅔ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.294–1 [As added by T.D. 5305, 1943 Cum. Bull. 260, and amended by T.D. 5403, 1944 Cum. Bull. 349, and T.D. 5420, 1944 Cum. Bull. 355] *Additions to the tax.*—(a) *General.*—Section 294(d) provides for certain additions to the tax in the case of—

(1) failure to file timely a declaration of estimated tax;

(2) failure to pay within the time prescribed any installment of declared estimated tax; and

(3) substantial underestimate of the estimated tax.

These additions to the tax are in addition to any applicable criminal penalties.

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax.*—(1) *Failure to file declaration.*—Section 294(d)(1)(A) provides for an addition to the tax in the case of a failure to make and file a declaration of estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment and in addition 1 per cent of the unpaid amount of the installment for each month (except the first) or fraction thereof during which such amount remains unpaid. Such addition to the tax with respect to any installment due but unpaid shall not exceed 10 per cent of the unpaid portion of such installment. For the purposes of section 294(d)(1)(A) the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the

correct tax reduced by the credits for tax withheld at source.

* * * * *

(2) *Failure to pay installment of declared estimated tax.*—Section 294(d)(1)(B) provides for an addition to the tax in the case of the failure to pay an installment of the declared estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax is applicable to delinquency in payment only (1) where a timely declaration of estimated tax has been made and filed or (2) where the Commissioner has found that the failure to make and file a timely declaration was due to reasonable cause and not to willful neglect. Such addition to the Tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment of declared estimated tax and in addition 1 per cent of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. The addition to the tax is limited with respect to any installment due but unpaid to 10 per cent of the unpaid portion of such installment. Such addition to the tax is not applicable in cases to which the addition to the tax under section 294(d)(1)(A) applies.*

* * * * *

(3) *Substantial understatement of estimated tax.*—Section 294(d)(2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer.

For the taxable years beginning after December 31, 1942, except as hereinafter provided—

(A) In the case of individuals, other than those exercising the election under section 60(a), relating to farmers, an addition to the tax under section 294(d)(2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages and the credit under section 32) is less than 80 per cent of the tax imposed by Chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

* * * * *